FILED
MAR 21 1996
CLERK

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No. 95-1248

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SAMANTHA NEELY, by and through her parents, MR. AND MRS. GEORGE NEELY,

Petitioner,

-against-

RUTHERFORD COUNTY SCHOOLS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO THE BRIEF IN OPPOSITION

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I. RESPONDENT IS UNABLE TO RECONCILE THE DIRECT CONFLICT BETWEEN THE DECISION OF THE SIXTH CIRCUIT AND THIS COURT'S DECISION IN IRVING INDEPENDENT SCHOOL DISTRICT V. TATRO, 468 U.S. 883 (1984).

Contrary to the assertion of the school system, Brief In Opposition at p. 9, Tatro does clearly and unequivocally hold that the medical services exclusion is limited to the services of a physician or hospital: "By limiting the 'medical services' exclusion to the services of a physician or hospital, both far more expensive, the Secretary has given a permissible construction to the provision." 468 U.S. at 893.

The school system's attempt to harmonize the Sixth Circuit's decision in this case and Tatro is ineffective. The school system does nothing more than repeat the arguments from the Sixth Circuit's opinion and the decisions upon which it is based that attempt to distinguish Tatro on the basis of cost. The school system makes no effort to respond to Petitioner's argument that the Court discussed cost in Tatro for two specific reasons, and that neither discussion supports the analysis of the Sixth Circuit or the cases upon which that analysis is based. Nor does the school system respond to Petitioner's argument that these two discussions not only do not support the Sixth Circuit's analysis, they contradict that analysis.

II. RESPONDENT'S ARGUMENT THAT THE SIXTH CIRCUIT'S DECISION IS LIMITED TO THE FACTS IS ERRONEOUS AS THE DECISION IS CLEARLY APPLICABLE TO CHILDREN WHO NEED SCHOOL HEALTH SERVICES AND COULD BE APPLIED TO CHILDREN WHO NEED OTHER RELATED SERVICES.

The school system's argument that the Act's requirement of individualized education planning limits this case to the facts, Brief in Opposition at p. 12, is unpersuasive. First, there is no citation of authority in support of this argument. Second, the school system does not explain why the Act's requirement of individualized education planning prevents this case from being a precedent in other cases. Third, earlier decisions in this line of cases were cited as precedent in this case.

Furthermore, there is nothing in the Sixth Circuit's opinion which can be read to limit the decision to the facts. On the contrary, the decision states or endorses a number of rules that are generally applicable to whether a requested service is a school health service or an excluded medical service.

These rules include the following: (1) Only school health services of a simple nature are required by the Act, Neely v. Rutherford County Schools, 68 F.3d 965, 970 (6th Cir. 1995); (2) The better interpretation of Tatro is that a school district is not required to provide every service which is "medical in nature," Id. at 971; (3) In determining whether a requested service is a

school health service or an excluded medical service, it is appropriate to take into account the risk involved and the liability factor of the school district, Id.; (4) Requiring a school district to hire a school nurse to provide school health services to a single child is inherently burdensome, without regard to the actual cost of providing the service, Id.; and (5) The Act requires only intermittent school health services that the school system can provide at little expense in both time and money, Id. at 972.

The Sixth Circuit's decision bars the school house door to any child requiring more than simple and inexpensive school health services.

While it is true that the children denied access to school would be eligible for homebound services, they obviously lose all the benefits of an integrated education in a public school. Furthermore, even from a purely academic standpoint, homebound teaching has significant limitations. It typically consists of only a few hours per week, with a single teacher expected to cover all the subjects the child is studying. American Academy of Pediatrics, Children With Health Impairments, 86 Pediatrics 636 (1990). See also, Department of Education v. Katherine D., 727 F.2d 809 (9th Cir. 1983) at f.n. 10.

The school system denounces as a "gross exaggeration" Petitioner's statement that the rights of thousands of children are endangered by the Sixth Circuit's decision and the line of cases upon which it is based. Brief in Opposition, at 12.

Two to four percent of children have severe illnesses that interfere with the usual activities of childhood. American Academy of Pediatrics, supra at 636. These conditions include rheumatoid arthritis,

asthma, leukemia and other malignancies, spina bifida, seizure disorders, neuromuscular diseases, acquired immune deficiency syndrome, and other chronic conditions. It also includes a small but increasing number of children who require specific technologies like respirators and children who require procedures such as tube feeding or bladder catheterization. Id.

In the past decade, there has been a tremendous increase in the number of children surviving infancy with serious medical problems as a result of advances in medical and rehabilitation technology. As a result, the incidence of children with special health needs in the general population and the complexity of their needs has increased dramatically. Parette, et al, The Nurse's Role In Planning For Inclusion of Medically Fragile and Technology-Dependent Children in Public School Settings, 17 Issues In Comprehensive Pediatric Nursing 61 (1994) at 61-62.

In addition, since the Sixth Circuit's ruling applies to services which are "medical in nature," 68 F.3d at 971, there is every reason to believe that the ruling could be extended to other related services like occupational therapy and physical therapy which could be described as "medical in nature." Thus, the potential impact of this decision extends to all children who require related services to benefit from special education.

CONCLUSION

The Sixth Circuit, as well as the Second Circuit, the Ninth Circuit, and District Courts from the Third, Seventh, and Tenth Circuits, are in direct conflict with Tatro. See, Brief In Opposition, authorities cited at p. 7 - 8.

In Honig v. Doe, 484 U.S. 305 (1988), this Court refused to "rewrite" the Individuals with Disabilities Education Act to read a "dangerousness" exception into the Act's "stay put" provision. 484 U.S. at 323. The Court must now intervene to prevent the lower courts from rewriting the Act in a way that discriminates against children with chronic health problems who may require something more than simple, inexpensive, and intermittent school health services. That does not mean that the Act provides a blank check to children with serious health problems. Cost can be a factor in determining the least restrictive environment for a particular child. But it is only one of several important factors. See, e.g., Sacramento City Unified School District v. Holland, 14 F.3d 1398 (9th Cir. 1994). Under the ruling of the Sixth Circuit, cost becomes the only factor.

Respectfully submitted,

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